IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.882 OF 2006

The State of Maharashtra
(Through State C.I.D.,
Alibag, Dist - Raigad .. Applicants.

Vs.

1. Pratapsinha @ Sanjay
Shankarrao Chavan
Age: 40 yrs, Occ. Service
Residing at: 15, West,
2nd Lane, Madhuban Society,
Sangvi, Pune ..

2. Shankarrao Bapusaheb
Balwantrao Chavan ..

3. Smt.Bhagirathibai
Shankarrao Chavan .. Respondents.
(Residing at same as above)

WITH

CRIMINAL WRIT PETITION NO.405 OF 2006

1. Shri Madhav J.Jamdar
Residing at 601, Siddhi
Vinayak Annex C.H.S. Ltd.
Sitaram Jadhav Marg,
Lower Parel (W), Mumbai - 13. ..

2. Shri Jayajirao D.Jamdar
Judicial Officer,
Residing at 601, Bldg.No.5A,
Purva C.H.S.Ltd, Ashanagar,
Borivli (E),
Mumbai 400 066 ..

3. Shri Shriram J.Jamdar
Residing at 82, Budhawar
Peth, Pune - 2 .. Petitioners.

Vs.

1. Pratap Singh @ Sanjay
Shankarrao Chavan
residing at: 15 West,
2nd Lane, Madhuban Society,
Sangavi, Pune ..

2. State of Maharashtra at
the instance of State C.I.D.,
Alibag, Dist.Raigad .. Respondents.

Mr.Rajiv Patil with Mr.Shriram Kulkarni for the petitioners in WP No.405/2006.

Mr.S.R.Borulkar P.P. with Mrs.M.M.Deshmukh A.P.P. for the State.

Mr.S.R.Chitnis, senior counsel i/b Mr.Amol Patankar for respondent no.1 in WP No.405/2006 and for the respondents in Criminal Application No.882/2006.

CORAM : D.B.BHOSALE, J.

DATED : 31ST AUGUST, 2006

JUDGMENT:

. Heard Mr.Borulkar learned P.P. for the State. Mr.S.R.Chitnis, learned senior counsel for the respondent-accused and Mr.Rajiv Patil, learned counsel for the complainant.

2. Rule, returnable forthwith. By consent taken up for final hearing. Mr.Chitnis, learned senior counsel waives service for respondent-accused.

3. The facts and circumstances against which these petitions are filed are common, the prayers made therein are similar and hence they are being disposed of by common order. The State, in the first petition

though have invoked the provisions contained in section 439(2) and section 482 of the Code of Criminal Procedure, 1973 (for short "the Code") seeking cancellation of the anticipatory bail granted to the respondent-accused, their application basically challenges the order dated 13.12.2005 passed by the Sessions Court on Criminal Bail Application No.604 of 2005. In the second petition, filed by the original complainant, his father and brother, they have prayed for quashing and setting aside the aforesaid order dated 13.12.2005, insofar as accused - Pratapsinha @ Sanjay Chavan is concerned, whereby anticipatory bail has been granted to him and his parents.

4. Mr.Borulkar, learned P.P. fairly stated that he has instructions not to press their application seeking cancellation of bail against accused no.2 and 3, parents of accused no.1. In view of the statement made by Mr.Borulkar, their application against respondent nos.2 and 3 stands dismissed as not pressed. For the sake of brevity, hereinafter, the original complainant - Shri Madhav J.Jamdar and accused - Pratap Sinha Chavan will be referred to as "the complainant" and "the accused" respectively, whereas the petitioner - "The State of Maharashtra" will be referred to as the "State".

5. The impugned order dated 13.12.2005 was passed by the Sessions Court in Criminal Miscellaneous Application No.604 of 2005, after it was remanded by this Court vide order dated 17th November, 2005 in Criminal Application No.6726 of 2005. That application was filed against the common order dated 4.10.2005 passed in Criminal Miscellaneous Application No.566 of 2005 and in Criminal Application No.604 of 2005.

. Criminal Miscellaneous Application No.566 of 2005 was filed by the State for cancellation of anticipatory bail granted to the accused on 29th June, 2000 when the offence was registered by Khopoli police station on the basis of the FIR lodged on 17.6.2000 by the complainant bearing C.R.No.57/2000 under section 498-A and 306 of Indian Penal Code (for short "IPC"). Whereas criminal miscellaneous application No.604 of 2005 was filed by the accused seeking anticipatory bail after the charge was altered and the offence was registered under section 302 IPC on 12.8.2005 by the learned Magistrate, Khalapur. Both these applications were disposed of by the Sessions Court vide order dated 4.10.2005 by which the application of the State for cancellation of anticipatory bail was allowed and the application seeking anticipatory bail filed by the accused was rejected. That order was challenged

before this Court in the aforesaid Criminal Application No.6726 of 2005.

. This Court, vide order dated 17.11.2005 disposed of that application and restored criminal miscellaneous application No.604 of 2005 to file and the Sessions Court was directed to decide it afresh within time frame. The Sessions Court has thereafter considered and granted the prayer of anticipatory bail under section 438 of the Code afresh and it is this order which is impugned in the instant petitions.

6. This matter has a checkered history. However, I would like to make reference to factual matrix that would be relevant and necessary for deciding these petitions challenging the order passed by the Sessions Court granting anticipatory bail to all the accused. The accused at the relevant time was working with Wartsila Ltd. as the Production Manager and was staying with the deceased and their son in the residential quarters provided by the company within the campus of the factory at Khopoli. On the fateful day i.e. 14.6.2000 after his son left for school he claims that he also left at 8.00 a.m. and thereafter the deceased alone was at home.

. At about 12.15 p.m. he received a call from his neighbour Mrs.Ambulkar. In response thereto he immediately rushed to his house and opened the door with his keys, in the presence of Mrs.Ambulkar and their maid servant - Farjana and found, that his wife, deceased - Pooja was lying in the kitchen in a burnt condition. He immediately informed the police at Khopoli police station which recorded his statement and seem to have registered an accidental death report.

. In the report, it was specifically mentioned by the accused that she committed suicide by pouring kerosene on her person and setting herself ablaze as she was fed up with her mental disorder which she was suffering from for several years and more particularly after she was operated three years prior to the incident. The mental disorder which the deceased was suffering is described as "maniac depressive disorder". The alleged incident was thereafter informed to the complainant, who rushed to Khopoli with his family members. On 17.6.2000, the FIR was lodged by the complainant, brother of the deceased, and pursuant thereto the crime bearing C.R.No.57/2000 under section 498-A and 306 of IPC was registered.

. The accused, thereafter obtained anticipatory

bail on 29.6.2000. The Sessions Court while granting anticipatory bail to the accused, directed him to report to Khopoli police station between 6.30 pm to 8.30 pm until filing of the chargesheet and was also directed not to leave Khopoli without permission of the Court.

7. It appears that on 21.2.2001 after the investigation was completed the police submitted "A" summary report which learned Magistrate granted on the very same day. The complainant being aggrieved by the order "A" summary passed by the Court, filed Criminal Writ Petition No.971 of 2001 for seeking re-investigation in C.R.No.57/2000. This court vide the order dated 1.8.2001 set aside the order dated 21.2.2001 and directed the learned Magistrate to consider the report submitted by the police seeking "A" summary afresh after hearing the complainant.

. The learned Magistrate by the order dated 6.10.2001 after hearing the complainant directed further investigation. On 2.3.2002 after re-investigating the offence, once again "A" summary was sought by the police. Before the Magistrate could pass any order thereon, the complainant once again approached this Court in criminal writ petition No.456 of 2002 seeking re-investigation of the crime. This

Court vide order dated 3.5.2002 allowed the prayers made in the writ petition and transferred the investigation from Khopoli police station to State - C.I.D, and further directed them to complete the investigation, as far as possible, within six months.

. It appears that the State - C.I.D. after taking over the investigation recorded the statements of various witnesses. The complainant also took several steps in helping the investigating agency in the investigation of the crime. The fresh statement of the complainant was also recorded in June 2004 and on the basis of further investigation the C.I.D. approached the learned Magistrate for alteration of charge on 12.8.2005 and the offence under section 302 was registered against the accused persons on that date.

8. Against the backdrop of the facts aforestated, I heard Mr.Borulkar, learned P.P. for the State. Mr.Chitnis, learned senior counsel for the accused and Mr.Rajiv Patil, learned counsel for the complainant at great length. They took me through the entire record placed before me as also through several judgments of the Supreme Court in support of their contentions.

9. Mr.Borulkar, at the outset submitted that the court below ought not to have granted anticipatory bail to the accused who is charged of the offence under section 302 IPC, as a result of which no progress in the investigation could be made by the investigating agency. The offence in question took place in June, 2000 and since then the accused is enjoying freedom. The investigating officer did not get an opportunity to interrogate him in custody. He then submitted that even after the charge was altered on 12.8.2005 the C.I.D. made all efforts to get custody of the accused for interrogation. But their efforts were in vain. He took me through several documents in support of his contentions and in particular spot panchnama, inquest panchnama, post mortem notes, photographs and expert's opinions which form part of the record, including the opinion expressed by two doctors of the Grant Medical College to contend that the deceased was first killed and then burnt and her burnt body was kept in the kitchen to make a show that she committed suicide in the kitchen. He invited my attention to the spot panchnama to contend that the situation of all the articles and the condition of the walls clearly demonstrate that alleged incident of burning did not take place in the kitchen as tried to be demonstrated by the accused. The investigating officer did not take prompt steps,

as he was expected, either by arresting the accused or recording the statements of neighbours or by drawing panchnama of the entire flat. The attitude of the investigating officer, as seen from the sequence of events, clearly demonstrates that the investigating officer was trying to save the accused. He also took me through the order of anticipatory bail granted by the Sessions Court and submitted that it is perverse and is based on erroneous considerations. He submitted that the learned Judge has misread the report of Grant Medical College to record the finding that merely because the tongue was protruding it cannot be positively said that the death of the deceased has occurred due to some other cause and not by burning. He next invited my attention to the observations in paragraphs 4 and 7 of the impugned order in particular to contend that the learned Judge committed grave error of law in applying the settled principles which could be relied upon at the stage of final judgment after trial. The principle that if two views are possible, the one in favour of the accused should be accepted and that the occular version should be accepted against the expert’s opinion were wrongly employed by the learned Judge while granting anticipatory bail to the accused. If such a view is accepted and endorsed by this Court every accused in every case will have to be enlarged on bail. Lastly,

he submitted that the accused may not be allowed to take advantage of the defective investigation or tainted investigation. The contaminated conduct of the investigating officer should not stand in way of further investigation otherwise the investigation would not make any progress and the real culprit would never be booked for the alleged offences.

10. Mr.Patil, learned counsel for the complainant also took me through several documents and in particular the opinions expressed by the Medicolegal experts, namely, Dr.Phatnani, Dr.Parikh as also the opinion expressed by the Grant Medical College and submitted that the learned Judge committed gross error in granting anticipatory bail to the prime accused in the offence of murder. He further submitted that besides the order being erroneous and perverse the learned Judge ought not to have discussed the merits and demerits of the evidence while giving reasons for grant of bail when the matter is still under investigation. Mr.Patil further submitted that the expert's report amply shows and establish that there is every reason to believe that death occurred prior to burn injuries and therefore investigation with regards to said area is required. He then invited my attention to the sequence of events right from the date of incident till this date to contend that the

investigating agency initially tried to save the accused and as a result of which the complainant had to approach this court on two earlier occasions. Firstly, for getting "A" summary report set aside and secondly, for not accepting "A" summary report filed after re-investigation and also to seek transfer of investigation from the local investigating agency to C.I.D. On both these occasions this Court passed the orders in favour of the complainant which clearly demonstrates that the investigation was not only tainted but designed to save the accused from the charge under section 302 IPC. They did not draw panchnama of the entire flat which was necessary in this case and also to record the statements of the neighbours immediately after the occurrence. The defence of alibi propounded by the accused at this stage cannot be considered. The investigation is in progress and also in view of the fact that the place of occurrence and the place of work of the accused were within the radius of 500 sq. mtrs. Mr.Patil also invited my attention to the order of anticipatory bail dated 29.6.2000 when the offence was registered only under section 498-A and 306 of IPC and submitted that the applicant did not observe the conditions imposed on him by the Court while passing that order. He did not report to the police station at all. It was then submitted that the accused without permission

of the Court left India on several occasions for quite sometime which also hampered the investigation and, therefore, on these grounds also the bail deserves to be cancelled. Both Mr.Borulkar and Mr.Rajiv Patil in support of their contentions placed heavy reliance upon the following judgments of the Apex Court: **R.Rathinam Vs. The State and Anr. AIR 2000 SC 1851; Puran Vs. Rambildas and Anr. AIR 2001 SC 2023; Pokar Ram Vs. State of Rajasthan and Others AIR 1985 SC 969; Gurcharan Singh and Others Vs. State (Delhi Administration) AIR 1978 SC 179; Anwari Begum Vs. Sher Mohammad and Anr. (2005) 7 SCC 326; Munshi Prasad and Others Vs. State of Bihar 2002 SCC (Cri.) 175 and Karnel Singh Vs. State of Madhya Pradesh (1995) 5 SCC 518**.

11. Per contra, Mr.Chitnis, learned senior counsel for the accused at the outset, after inviting my attention to the order passed by the learned Sessions Judge dated 13.12.2005 granting anticipatory bail, submitted that by no stretch of imagination the said order could be termed as perverse or stated to have based on irrelevant considerations or it was passed ignoring material on record. He took me through paragraphs 4 to 7 of the order in particular and submitted that it demonstrates the application of mind to every piece of paper that was produced before him

and, therefore, such order in any case, cannot be interfered with in the absence of the allegations such as tampering of evidence or that the accused misconducted himself or that he has attempted to interfere with the investigation. Mr.Chitnis further submitted that since his release on bail in June, 2000 until the application for cancellation of bail was filed in 2005 the applicant-accused was never called by the Investigating Officer for interrogation which itself would show that the custody of the accused is not required for any purpose whatsoever. On the other hand the applicant was always ready to co-operate with the investigation and was available for interrogation since after the order of anticipatory bail was passed in June, 2000. He did not leave Khopoli for four years. No concrete instances of tampering of evidence were pointed out either by the prosecution or by the complainant and, therefore, under no circumstances the bail deserves to be cancelled. My attention was invited to the letter dated 21st February, 1989 written by the father of deceased - Pooja to contend that it clearly discloses that Pooja was sufferring from some mental disorder and as a matter of fact she was continuously treated by the Doctor, who are known to be renowned Psychiatrist. He then submitted that the fact of her mental illness was also mentioned by the complainant in the FIR dated 17.6.2000. The act

of committing suicide was the result of the illness, she was sufferring from. The accused has so stated in the accidental death report dated 14.6.2000. That report further shows that she was operated three years prior to the alleged incident and she was fed up with her illness and in that state of mind she committed suicide. Insofar as the submissions of Mr.Borulkar and Mr.Rajiv Patil based on the documents, namely, spot panchnama, inquest panchnama, post mortem notes and the opinions expressed by different medicolegal experts is concerned, Mr.Chitnis submitted that the learned Sessions Judge while granting anticipatory bail had taken all that into consideration and it is reflected in the order itself. He further submitted that merely because Dr.Phatnani and Dr.Parikh have opined that the death was homicidal and it was not suicide, that by itself cannot be a ground for cancellation of bail. The investigating agency had sufficient time and opportunity to investigate the offence or to interrogate the accused. As a matter of fact this court had directed the investigating agency to complete the investigation within six months vide order dated 3.5.2002. Despite that it was neither completed within the time stipulated nor the investigating agency approached this Court for extension of time. For more than three years they did not make any progress in the investigation. Even in

one of the petitions filed in this Court the affidavit was filed by the investigating officer that the investigation was almost over and they would file the chargesheet soon. That affidavit was filed by the investigating officer in criminal application No.79 of 2006 in February 2006 which further shows that the custody of the accused is not necessary. He then submitted that the investigating officer slept over the matter for three years and except recording some statements in 2004 has not done anything and in view of the order dated 3.5.2002, it was incumbent upon the officer to inform this court about progress of the investigation and specifically the reasons why the investigation could not be completed. He then submitted that the proviso to section 167 of the Code is akin to the order of this Court recorded on 3rd May, 2002 and, therefore, the observations of the Supreme Court regarding proviso to section 20, sub-section 4(bb) of TADA in the case of **Hitendra Vishnu Thakur Vs. State of Maharashtra AIR 1999 SC 2623** clearly stand attracted. The reliance was also placed on the judgment of the Supreme Court on Aslam Babulal Desai Vs. State of Maharashtra AIR 1999 SC 1. The observations of the Supreme Court in **State of Andhra Pradesh Vs. P.V.Pavithan 1990 (2) SCC 340**, according to Mr.Chitnis, also stand attracted in view of the fact, after the order of the Division Bench

dated 3.5.2002 to complete the investigation within six months, no investigation has been carried out at all till obtaining medical opinion of the Doctors of J.J.Hospital and police surgeon. In this backdrop, according to Mr.Chitnis, it is clear that there was no investigation during this period and, therefore, the question of cancelling anticipatory bail granted by the Sessions Court based on sound reasons does not arise. My attention was specifically drawn to the opinion of the Doctors of Grant Medical College and J.J.Group of Hospitals as also to the finding recorded by the Sessions Court in the impugned order to contend that in any case it cannot be definitely said that Pooja died homicidal death and that murder is the only conclusion, which could be drawn at this stage. Then my attention was drawn to the observations of the Division Bench of this Court in **State of Maharashtra Vs. Vishwas Shripati Patil and Others 1978 Cri.L.J.1403** to contend that the principles to be applied and borne in mind while dealing with an application for cancellation of bail interalia could be taken recourse to while considering the application for cancellation of anticipatory bail also. The reliance was also placed upon the following judgments of the Supreme Court wherein the Supreme Court has laid down the principles to be taken into consideration while considering the application for

cancellation of bail: **State Vs. Sanjay Gandhi AIR 1978 SC 961; Gurbaksh Singh Sibbia etc. Vs. The State of Punjab AIR 1980 SC 1632; Bhagirathsinh s/o Mahipat Singh Judeja Vs. State of Gujarat (1984) 1 SCC 284; Mahant Chand Nath Yogi & Anr. Vs. State of Haryana (2003) 1 SCC 326; Satich Dhond Vs. State of Goa 2006 ALL MR (CRI.) 1412 and Shantaram Baburao More Vs. State of Maharashtra 2002 ALL MR (CRI.) 1286.** Let me mention that Mr.Chitnis took me through the passages of several judgments cited by him in support of aforesaid submissions. Lastly, he submitted that the order of Sessions Court dated 13.12.2005 cannot be said to be erroneous or perverse and, therefore, needs no interference by this Court in the present petitions.

12. The Supreme Court in **Sanjay Gandhi** (supra) has observed that "rejection of bail when the bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial".

. It is also settled by the Supreme Court in several pronouncements that the considerations applicable to grant of bail and consideration for cancellation of such order of bail are independent and do not overlap each other. The bail once granted could be cancelled only if grant of bail is unjustified, arbitrary, or otherwise vitiated by serious infirmity or wrong exercise of discretion, as also post bail conduct of the accused being not conducive for further investigation and/or a fair trial or change of circumstances which would require the accused to be in custody.

. The Supreme Court in the **State of U.P. Vs. Amarmani Tripathi 2005(8) SCC 21** has observed that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant under section 439 read with 437 of the Code, continue to be relevant.

. The Supreme Court in **Puran Vs. Rambilas and Anr.** (supra) while considering the application for cancellation of bail has observed that the concept of setting aside the unjustified, illegal or perverse

order is totally different from the concept of cancelling bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position was also made clear by the Supreme Court in **Gurcharan Singh Vs. Delhi Administration** (supra).

. It is true that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. But the Supreme Court in **Puran Vs. Rambilas** (supra) has observed that "one such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of the nature like bride burning and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.".

. Keeping these principles, enunciated in the various judgments cited by the learned counsel for the parties in view, I would like to examine the submissions advanced by the learned counsel. However, while doing so it also will have to borne in mind that in the present matters what is being challenged is the order granting anticipatory bail to the accused, who right from the inception is enjoying freedom and was never made available to the investigating agency for custodial interrogation. In other words, in the instant petitions the anticipatory bail is sought to be cancelled not on the ground that the liberty granted to the accused would not be conducive to a fair trial or he misconducted himself but on the ground that the impugned order was unjustified, illegal and perverse and that his custodial interrogation is necessary to unfold the truth.

13. What broadly emerges from the above discussion and, which, in my opinion, will have to be borne in mind, while considering the application challenging the order of grant of anticipatory bail, is outlined as follows; Cancellation of bail when the bail is applied for is one thing and cancellation of ‘Anticipatory Bail’ is quite another. In other words, the considerations for cancellation of bail of the accused, who was in custody for sometime and was

released on bail by the court, with or without conditions, would be quite different. If cancellation of anticipatory bail is sought on the ground that the custody of the accused for further investigation/interrogation is necessary and/or if the order granting such freedom is perverse or is based on erroneous considerations it could be set aside irrespective of the fact whether after grant of anticipatory bail the accused has misconducted himself or committed breach of the conditions or has not endeavoured to tamper with the evidence. It depends upon the facts of each case. There could be a case where accused need not indulge in any such activity providing ground for cancellation but still his custody becomes necessary to unearth the truth or the order granting anticipatory bail is found to be unjustified, perverse and illegal and based on erroneous considerations, looking to nature and gravity of the charge or when there exist cogent and overwhelming grounds or circumstances necessitating setting aside of such order and consequently cancellation of anticipatory bail. In other words, the concept of setting aside the unjustified, illegal and perverse order is totally different from cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation, besides the usual grounds

such as interference or attempt to interfere with the due course of investigation or administration of justice, committing similar crime while on bail or accused is likely to abscond etc.

14. In the present case, my attention was mainly drawn to the post mortem notes dated 14.6.2000, inquest panchnama dated 14.6.2000, spot panchnama dated 14.6.2000 and to the opinions of the medicolegal experts placed on record, to contend that the discrepancies between the post mortem notes and the inquest panchnama in respect of description of the dead body, pieces of clothing found on the body and findings with respect to the location, extent and depth of burn injuries, show that it was homicidal death and not the suicide, as has been projected right from the inception.

15. I perused all the aforesaid documents as also several other documents with the assistance of both the learned counsel for the parties. The spot panchnama and the photographs placed on record, prima facie, show that the kitchen, where the deceased was found lying burnt, all the articles were seen intact and at their place and were not scattered and affected at all. The walls, ceiling and other articles were also not affected by the smoke and/or heat. Even the

curtains of combustible material, remain unaffected. There was no blackening of the ceiling or any of the articles lying in the kitchen. According to the accused and more particularly his statement recorded by the police on the date of occurrence, the deceased used the kerosene to pour on herself and set herself ablaze from the stove in the kitchen. The said stove is clearly visible in one of the photographs placed on the record. It was at some distance from the dead body which is also seen in the photograph. The lid of the kerosene tank of the stove was open, however, its disk and burner cap, which are loose parts of the stove, were in place. The floor of the kitchen around the stove and the articles close to dead body, prima facie do not show any indication of alive person was being burnt, besides the fact whether it was homicidal death or suicide. According to the post mortem notes 95% of the body was found burnt but none of the articles or wall was found blackened. Even the plastic articles kept on the floor of the kitchen such as bucket was also found intact and unaffected due to heat. The spilled kerosene was also found beneath the head. The photograph and the spot panchnama does not show any spillage of kerosene around the stove. Though, I do not wish to record my impression on the basis of the spot panchnama and the post mortem notes as to what could have happened, it certainly creates

doubt as to the claim made by the accused that the deceased poured kerosene from the stove and set herself ablaze in kitchen, where, she died of receiving 95% burn injuries. Something more seems to have happened which is not forthcoming.

16. That takes me to consider the post mortem report on which the learned counsel on both the sides advanced their submissions at great length. The complainant sought Medicolegal opinion of late Dr.Phatnani, the then known Medicolegal consultant. The opinion was placed on record and it was also before the learned Sessions Judge, who granted impugned anticipatory bail to the accused. The opinion was expressed on the basis of the post mortem notes, inquest panchnama, spot panchnama and the letter of the complainant addressed to the Superintendent of police. Dr.Phatnani in his report before recording his conclusions has pointed out several discrepancies and inconsistencies between the post mortem notes and the spot and inquest panchnama. He has specifically made reference that the post mortem notes which record that the tongue was inside the mouth. Unlike inquest panchnama, it records only burning of the right hand and not both the hands and most importantly, does not mention about burnt condition of the face and the soles and the presence

of blisters as noted in the inquest panchnama. The another aspect which he had noticed in respect of column no.20 in the post mortem notes was recording of presence of soot in tracheobronchial tree. It only mentions that the larnyx, trachea and bronchi are filled with small amount of red frothy fluid. It further records both lungs being congested, carbon pigmented and on cut section, showing frothy red fluid. He has expressed that the said carbon pigmented appearance of the lungs is due to presence of anthrocotic pigments, which are present in the lungs of every individual who has respired urban air polluted with suspended particulate matter and carbon containing vehicular exhaust fumes. This is not the same as presence of soot, that is, carbon particles in the tracheobronchial tree, which is found due to inhalation of smoke when a person is alive and burning, which gets stuck to the mucous membrane of the larynx and tracheobronchial tree. On the basis of the aforesaid finding and other findings in the report he has opined that notings in column no.18 of the post mortem notes that the burn injuries are antemortem, must be viewed with suspicion. The report of Dr.Phatnani is annexed to the writ petition No.405 of 2006 filed by the complainant. It is dated 10.7.2001. There is no dispute that the report forms a part of the record. It would be advantageous to reproduce the

relevant portion of the "conclusions" arrived at by Dr.Phatnani after examining the aforestated documents. The conclusions read thus:

> (a) **The absence of soot in the larynx and the tracheobronchial tree is highly suggestive of body having already been dead before it was set on fire**. There is no evidence of sudden high intensity flash fire or explosion to justify the absence of soot in the larynx and tracheobronchial tree.
>
> (b) Extensive involvement of the anterior surface of the body and the scattered involvement of the posterior surface suggests that in all probabilities, the combustible material was either poured or sprinkled on the body when the deceased was in a supine position, that is lying on her back.
>
> (c) **The buccal cavity, tongue, pharynx and oesophagus are normal, which shows that there was no effect of inhalation of hot gases or smoke, which is a further suggestive of the probability of body being dead before being burnt**.
>
> (d) It is highly unusual that a person who has allegedly contemplated to commit suicide by pouring kerosene on her person and setting herself on fire, would not remove the towel wrapped around her head. **The presence of towel in the said manner on the person of the suicide suggests that in all probabilities she had come out of bath before the said incident took place**.
>
> (e) In view of th **absence of burning of any other structures in the kitchen, particularly the curtain which although of combustible material was found to be intact, and absence of blackening of either the ceiling or surroundings, the possibility of body having burnt elsewhere and brought into the kitchen, cannot be ruled out**.
>
> (f) **The Spot Panchanama describes pool of unburnt kerosene lying under and around the body. This is rather unusual because when the body is burning and the fuel which has been**

allegedly used to ignite the body would obviously burn till it is consumed, being a combustible material itself.

(g) While certifying the cause of death, the autopsy surgeon has given the final cause of death as "Cardiorespiratory failure due to shock due to 95% superficial to deep burns. However, the viscera are preserved for chemical analysis for final cause of death." Surprisingly, contrary to his own statement, he has certified the death as due to burns without awaiting the results of the chemical analysis. Such conclusion drawn by the autopsy surgeon is unscientific, particularly when no soot was found in the larynx and the tracheobronchiolar tree. **There is every likelihood that the deceased could have died due to reasons other than burns and the body was set on fire subsequently"**.

(emphasis supplied)

17. There is yet another opinion of one Dr.Parikh, Medicolegal Consultant on record dated 15.1.2005. The investigating agency has also recorded the statement of Dr.Parikh and have taken her written opinion on record. Dr.Parikh has also offered her comments on the opinion expressed by Dr.Phatnani as also by Dr.S.S.Parmar, who conducted autopsy of the dead body of Pooja. From perusal of the report of Dr.Parikh it appears to me that there is remarkable consistency in the opinion expressed by Dr.Parikh and Dr.Phatnani.

18. In pursuance of the order of this Court dated 3.5.2002 in criminal writ petition no.456 of 2002 the comments of Dr.Parmar were also sought by the investigating agency and it appears that he had

admitted some omissions on his part in noting certain aspects while performing post mortem on the deceased - Pooja. It would be relevant to reproduce the relevant comments offered by Dr.Parmar dated 8.1.2004 on the questions put to him in pursuance of the order of this Court.

Ans. a. In all antimortum burn presence of carbon particles in Larynx, Trachea & Bronchi is not must.

b. It is not necessary that the sute should be noted in case of homicidal or suicidal burn.

c. **In my opinion in this case the body was not being first killed & than burn by kerosene.**

Ans.2. a. As per panchanama it is stated that the tongue is protruded out of mouth. But at the time of post mortem examination. The tongue was inside the mouth.

b. **It is not necessary that in every burn case tongue should protrude** out of mouth.

c. Tongue protrudes out of mouth in case of

-Decomposed body

-Typical Hanging.

Ans.3. For answer of Q.3 see column no.17 of P.M. notes as both upper limbs burnt.

Ans.4. For answer of Q.4 see column no.17 of P.M. notes as Head & neck burnt.

Ans.5. For ans. of Q.5 see column no.17 of PM notes as a) both lower limbs burnt below m/3 of thigh but burn marks specially over sole is not mentioned, b) it is not necessary that sole of

foot should get burnt in suicidal burn. However, palm can get affected in suicidal burn.

Ans.6. Description of burn over parts of body is written in column no.17 of PM notes. Whereas percentage of burn is written in column no.23 of opinion as to the probable cause of death.

Ans.7. For the answer of Q.7 please take experts opinion of neurology and treating family physician of the deceased.

Ans.8. **Possibility cannot be ruled out that kerosene was poured over the body after the death of Puja.**

Ans.9. **The reason that kerosene under the surface of body must not have come in contact with which remained as per the Panchanama.**

Kindly accept my opinion for further needful procedure".

(emphasis supplied)

. From bare perusal of the aforesaid opinion, it is clear that Dr.Parmar was absolutely casual in responding to the queries made to him. As a matter of fact his reply to question no.2 in respect of protruding of tongue out is also not straight forward. He has avoided to reply the query in straight forward manner and has simply expressed that it is not necessary in every burnt case that tongue should protrude out of mouth. It is nobody’s case that tongue protrudes out in a case of burn. In fact it is other way round. The protruding of tongue in the case of death by burn, according to Dr.Phatnani, Dr.Parikh

and also two Doctors of Grant Medical College is not possible. Interestingly, in reply to question 8 Dr.Parmar has expressed the opinion that possibility cannot be ruled out that kerosene was poured on the body after the death of Pooja. This is contrary to his answer to the first question i.e. 1(c). I deem it appropriate to reproduce the comments offered by Dr.Parikh on the report of Dr.Parmar, which was procured by the investigating agency:

> (a) On page 1 of his said opinion, Dr.Parmar has opined "As per the observation given in column no.16, Position of limbs-Both upper and lower limbs are flexed and abducted at their respective joints according to this position it happens only in antemortem burn and it strongly suggests an antemortem burn (Pugilistic position)". The said opinion of Dr.Parmar is scientifically incorrect as it is medically well established that the pugilistic attitude results from stiffening and contraction of the muscles due to the coagulation of proteins of the muscles and dehydration; and that a body can assume such pugilistic attitude even if when burnt after death. Therefore, presence of pugilistic attitude of the deceased, in itself, does not mean that in the instant case, the burns were antemortem, particularly in the absence of soot in the larynx.
>
> (b) Dr.Parmar's explanation that the "P.M. notes has not mentioned soot in the larynx is an act of omission", is questionable. While recording his findings during the postmortem examination against column no.20(c), he has recorded "Larynx, Trachea and Bronchi: Filled with small amount of red frothy fluid", which indicates that he did examine these structures and recorded all his findings related thereto. Therefore, had he found the soot deposited in these structures, which is a very vital finding in a case of burns, then he would have certainly mentioned as such in the postmortem notes. Further, Dr. Parmar, even in his

earlier opinion, dated 28.01.2002, addressed to the API, Khopoli Police Station, which he gave after having perused late Dr.Pritam Phatnani's opinion, which emphasized absence of soot in the respiratory passages to be highly suggestive of the burns being postmortem in nature, has not mentioned anything in respect of such absence of soot in his earlier report, while dealing with his various notings in the postmortem notes, and giving his opinion as to why in the instant case the death was due to antemortem burns.

(c) The very fact, that Dr.Parmar did not mention the 'presence of soot', both, in the postmortem notes as well as his earlier opinion, strongly suggests that it was not 'an act of omission', as is made out to be now as an afterthought, but that he did not find soot in the larynx, trachea and bronchi.

(d) Had there been soot in the said structures, and the burns been antemortem in nature, then Dr.Parmar ought to have found the effects of heat and burning process in the buccal, cavity, teeth, tongue and pharynx. However, during the postmortem examination, he found and reported the said structures to be absolutely normal, as is seen from his notings in the postmortem notes, against the column no.21 "Buccal Cavity, teeth, tongue and Pharynx: NAD (no abnormality detected)". it is illogical and inconceivable that the mouth and the larynx, trachea and bronchi, which the hot gases and smoke formed due to burning have to pass through to reach the lungs, should remain absolutely normal, and the lungs should be 'charred'.

(e) Dr.Parmar, on page 2 of his said opinion, has further opined "As per the column no.20, both lungs are oedematous and shows frothy fluid, also suggests an antemortem process". However, while recording his findings against column nos.20(d) and 20(e), in the post-mortem notes, Dr. Parmar has not mentioned that the lungs were oedematous; nor has he mentioned about this in his earlier opinion dated 28.01.2002. Besides, lungs ooze blood stained frothy fluid even in cases of death due to asphyxia due to other causes.

(f) Dr.Parmar, on page 2 of his said

opinion, has further opined "Being a ladies, she was not a smoker and whatever CO deposit found in lungs strongly suggests an antemortem inhalation of fumes and carbon monoxide deposition in the lungs". The said opinion of Dr.Parmar is unscientific and once again inconsistent with his own findings recorded in the postmortem notes, wherein he has not mentioned anything about carbon monoxide, while recording his findings in the lungs. In fact, what he has mentioned against column nos. 20(d) and 20(e), while describing lungs is, "carbon pigmented". 'Carbon monoxide' is not the same as 'carbon'. Carbon monoxide essentially exists in the gaseous from and as such cannot be 'deposited' in the lungs, as opined by Dr.Parmar.

(g) As is explained in late Dr.Pritam Phatnani's opinion, "The carbon pigmented appearance of the lungs, mentioned in the postmortem notes, is due to the presence of anthrocotic pigments, which are present in the lungs of every individual who has respired urban air polluted with suspended particulate matter and carbon containing vehicular exhaust fumes. This is not the same as presence of soot, that is, carbon particles in the tracheobronchial tree, which is found due to inhalation of smoke when a person is alive and burning, which gets stuck to the mucous membrane of the larynx and tracheobronchial tree". In fact, the presence of carbon monoxide in the burns cases is always ascertained by sending the blood for estimation of carboxyhaemoglobin level, which was not done by Dr.Parmar in the instant case.

19. I do not wish to express any opinion on the opinions expressed by different Doctors as also aforesaid comments of Dr.Parikh on the report of Dr.Parmar, who performed autopsy. However, one thing is clear that Dr.Parmar was either casual or negligent while performing the post mortem or has deliberately committed material omissions while performing post

mortem and even while replying the queries made to him in pursuance of the order passed by this Court dated 3rd May, 2002. It is a matter of investigation, and I express no opinion one way or the other.

20. I would also like to refer to the opinion given by the Department of Forensic Medicines, Grant Medical College and J.J.Group of Hospitals, Byculla, Mumbai dated 13.6.2005, jointly given by Dr.C.R.Dode, Professor and Head, Department of Forensic Medicine and Dr.R.S.Bangal, Associate Professor, Department of Forensic Medicine, Grant Medical College. Mr.Chitnis, learned senior counsel in the course of arguments submitted that no other opinions except the one expressed by Department of Forensic Medicine, Grant Medical College could be looked into consideration, insofar as autopsy report is concerned. In view of the submissions of Mr.Chitnis I deem it appropriate to reproduce the relevant part of the opinion dated 13.6.2005 placed on record by the prosecution:

> . "I have perused all the documents and photographs submitted by you along with your letter referred to above. I have also read the interrogatory submitted by you. In response to the interrogatories, I wish to state serially as follows :
>
> (1). There are no external injuries mentioned in the postmortem report over the neck, face etc. to indicate that Pooja was either strangled or smothered to death.

. **The question whether she was set on fire after she was made unconscious by some means needs further police investigations.**

. **In such a situation there should have been signs of struggle over the body, neck, face etc. However, the possibility of disappearance of such superficial sign of struggle due to burns, cannot be ruled out.**

(2) and (3) Kindly directs these questions to Dr.Ramani, the neurosurgeon in this case.

(4) **Protrusion of tongue does not indicate suicidal nature of burn injuries.**

(5) **The photographs clearly show that the tongue was protruded out. There is no question of the tongue going inside the mouth once the rigor mortis sets in that the tongue is inside mouth is wrongly mentioned in the postmortem report.**

(6) Irrespective of whatever mentioned in the postmortem notes, the photographs clearly reveal that the palms and soles were not burn. Burning or not burning of palms and soles does not throw any light on the nature of injuries. Whether suicidal, homicidal or accidental. The fact has to be interpreted as per the prevailing circumstances of each case.

(7) It is not necessary that a person committing suicide will not pour kerosene over his / her head and face. Also, the head and face can be burnt even when kerosene is not poured over the head, as the flames travel upwards.

. It cannot be commented whether in this case the kerosene was poured over the head or not.

. The medical officer has neither mentioned any smell of kerosene in the hair, nor has he preserved the hair samples for chemical analysis, which might have helped in throwing light on this subject.

(8) In this case, as the photographs reveal, the genitalia and perennial region were completely burnt.

(9) **The fluid from the blisters should have been sent for chemical analysis to determine its contents. This would have helped in determining whether the blisters were antemortem or postmortem in nature**.

The blood should have been sent for determination of the CO (Carbon Monoxide) level. This again would have helped to conclude whether the deceased was alive and respiring at the time of sustaining burn injuries.

(10) 90 to 95%

(11) Kindly refer this question to the doctor who has drawn such a conclusion.

(12) **When a person is alive and breathing while he/she is burning the black soot particles get deposited over the mucous of larynx, trachea, tongue etc**.

. **In this case it is not mentioned in the post mortem report**.

. The medical officer has obviously confused between the soot deposition in larynx, the lung pigmentation and CO level in blood. All these are different parameters and should not be confused as one and the same thing.

. The carbon pigmentation in lungs mentioned by the medical officer, is not the same as "soot deposition" in larynx.

. The reason why the medical officer has not mentioned the "soot deposition" in larynx, might be that he did not notice any such "soot deposition".

(13) Congestion of organs (brain, lungs and heart) is one of the signs of violent asphyxial death. However, it is also observed in cases of death due to burns or poisoning.

(14) Postmortem notes mentions "distinguishable food contents in stomach". However, the nature of food (that is distinguishable) is not mentioned. Also, the quantity of food is not mentioned.

. Considering that the death occurred in morning hours, it can be approximately concluded that the time since death is 1 to 2 hours after her last meal/breakfast.

(15) Congestion of liver spleen and kidneys are typical signs of violent asphyxial death. However, such congestion is also seen in cases of death due to burns or poisoning.

(16) The description of small and large intestines and that of the urinary bladder is not diagnostic of asphyxial cause of death. Though in many cases of violent asphyxial death, purging (involuntary passage of urine and fecal matter) is seen, the medical officer has not mentioned any evidence of purging in this case.

(17) Congestion of lungs is one of the important signs of violent asphyxial death.

. It is not correct that the frothy fluid coming out on cross section of lungs is due to "charring process" as stated by the medical officer.

(18) It is not true that pugilistic attitude is attained only in cases of antemortem burns. it is also seen if the dead body is exposed to high temperature burning.

(19) **This question maybe directed to forensic science laboratory and it also need**s **further investigation**.

Opinion:

. **There are many lapses in the post mortem report. Hence, in view of the alleged facts and circumstances of the case, in my opinion, the case needs further police investigations**.

. This Medicolegal opinion must be regarded as Expert guidance in the process of investigation and not the evidence for the purpose of court trial.

. It is true that the P.M. report is not the

subject matter in this petitions nor are we trying Dr.Parmar. However, I found it necessary to reproduce different reports, as aforestated, to show consistency on certain points which definitely creates doubt as to the happenings at the relevant time within the four walls of the house of deceased and the accused. The opinion of Forensic Department of Grant Medical College clearly indicate that **protrusion of tongue out does not indicate suicidal nature of burn injuries**. The Sessions Court has overlooked these findings recorded in the opinion of Grant Medical College. The report also mentions that when a person is alive and breathing while he/she is burning, the black soot particles get deposited over the mucous of larnyx, trachea tongue etc. and have further opined that in the present case it is not mentioned in the post mortem report. The benefit is, however, given to Dr.Parmar, by Dr.Dode and Dr.Bangal, further observing that the Medical Officer was confused between the soot depositing in larynx, the lung pigmentation and CO level in blood. However, they have also stated that all these are different parameters and should not be confused as one and the same thing. It is further stated that the Medical Officer has not mentioned "soot deposition" in larynx, might be because he did not notice any such "soot deposition". However, **at the end of opinion they have clearly stated that there**

were many lapses in the post mortem report and the case needs further investigation. The opinions expressed by different doctors on the basis of inquest panchnama, spot panchnama and post mortem notes, indubitably create doubt as to the cause of death mentioned in the post mortem notes and, therefore, further investigation has become inevitable. The deceased appear to have had died homicidal death as indicated by the medicolegal experts, though, at this stage I do not wish to express any opinion about the cause of death recorded in the post mortem notes.

21. That takes me to consider the impugned order by which the accused were granted anticipatory bail. The learned Sessions Judge after narrating few facts in the first 3 paragraphs, in paragraph 4 of the order has made reference to two-three circumstances which according to him cannot be the grounds for refusing anticipatory bail to the accused. He has taken into account the report of the Grant Medical College in respect of protuding of tongue out to hold that "it cannot be conclusively said that protuding of tongue out, in the present case, was the sign of homicidal death". Next, after considering the spot panchnama and in particular the position of the stove and match stick found at the scene of offence, as also blackening of wall, he has observed that, "it cannot

be conclusively said that it was homicidal death". The learned Judge has though, stated in the impugned order that he perused all the papers on record, either he did not go through all the papers or did not consider them in proper prespective. But one thing is clear that he did not refer to the opinion of Dr.Parikh and to the response of Dr.Parmar, to the questions put to him pursuant to the order of this Court dated 3.5.2002.

. The reference to the mental disorder of the deceased has also been made in paragraph 5 of the impugned judgment. In that regard it was submitted that after the operation of the deceased, three years prior to the alleged occurrence, as stated in A.D. report, there is nothing on record to indicate that the severity of her trouble continued or increased so as to drive her to commit suicide. It was then submitted that the circumstances indicate that atleast on the day of the occurrence she was not having any such trouble. The record reveals that in the morning she had talked to the complainant, who informed her about the engagement ceremony of their cousin. She in turn, as stated by the complainant, had talk to her cousin congratulating him for engagement. Thereafter at about 10.00 a.m. the accused talked to her on

telephone. Wrapping of towel on the head also, prima facie, show that she had bath before the alleged occurrence. This all, according to Mr.Borulkar and Mr.Patil, prima facie, indicate that the cause stated by the accused in the A.D. report of the deceased committing suicide is not correct and it was misleading. It is not possible to express any opinion, though, it cannot be completely overlooked as is done by the learned Sessions Judge.

. The learned Sessions Judge, then proceeded to take recourse to the settled principles in law which, in my opinion, could be taken recourse to for giving benefit to the accused only after full fledged trial and not at the stage of investigation or while considering the prayer for bail or pre-arrest bail. In paragraph 4 he has observed that from the facts and circumstances of the case if two views are possible, the one in favour of the accused should to be accepted and, then in paragraph 7 after relying upon the judgment of this Court in **Shantaram Baburao Gore and Anr. Vs. State of Maharashtra 2002 ALL MR (Cri.) 1286**, he has observed that if there is inconsistency between the medical evidence and occular version the Court should approach the case with more care and caution while appreciating the evidence on record. I fail to understand as to how those

principles could be taken recourse to at this stage. If such principles are applied or taken recourse to at the stage of investigation, perhaps, every accused will have to be released on bail. In my opinion, on this count also, the order of bail is perverse and is based on irrelevant considerations.

. The learned Judge has further placed reliance upon **M.P. Lohia etc. Vs. State of West Bengal and Others (2005 AIR SCW 767)**. The reliance placed on that judgment was also misplaced. In that case there is clear observation that there had been attempt on the part of both the sides to create documents either to establish the criminal case against the appellants or on the part of the appellants to create evidence to defend themselves from such criminal charges and against that backdrop the Supreme Court held that correctness and genuineness of the documents can be gone into only after full fledged trial and it will not be safe to place reliance on any such document at that stage and, therefore, the Supreme Court had refused to comment on the genuineness of those documents. That is not the case in the present petitions. Here the prosecution as well as the complainant has relied upon the documents which form part of the record and it is nobody’s case that these

documents were created by the complainant. Mr.Chitnis did submit that the opinion of Dr.Phatnani was obtained by the complainant and it cannot be looked into for any purpose. The opinion of Dr.Phatnani is a part of record and it was taken into consideration even by the Division Bench of this Court which is seen from the order dated 3.5.2002. In any case it cannot be said that it was created by the complainant. Even the other two judgments relied upon by the learned Judge in **State of Maharashtra Vs. Kachrusingh Santram Rajput 1994 Bombay Criminal Cases 504; M/s.Nyanci Jamshed Andejania and Others Vs. State of Maharashtra (1993 Cri.L.J. 3465)** are of no avail to the accused and were wrongly relied upon in view of the peculiar facts and circumstances of the case.

. The relevant observations in the order of the learned Judge, in my opinion, need to be reproduced which would further demonstrate that the power to grant anticipatory bail was exercised erroneously and is based on irrelevant considerations, ignoring the relevant material in the documents such as spot panchnama, inquest panchnama, post mortem notes, opinions expressed by the doctors and referred to in the foregoing paragraphs and/or has misread those documents. The original order granting anticipatory bail is in Marathi. I got it translated from the

official translators office in the High Court. The relevant observations in paragraph four to seven read thus:

> "4. Upon taking over the investigation by the Criminal Investigation Department, in the report at Ex.8, it is found (?) as to exactly which circumstances had come before the investigating officer thereby the applicant Accused No.1 Pratapsinha had given the false information of accidental death nor there is mentioning of other particulars. But from the detailed submissions made by both the parties today and whichever facts set out by deceased Pooja's father Jayajirao on this day in his affidavit, in totality, it is only found that the new line of the investigation is determined pursuant to the defects (lacunae) expressed by the Grant Medical College's Forensic Department, in its opinion (from the Medical view point) dated 13/6/2005, in respect of the earlier investigation into the offence. By submitting the facts about the Post-Mortem Report of the deceased Pooja and the Special Expert's opinions obtained from time to time in that regard contradictory to (the said opinion, a opinion) **that Pooja's tongue had come out of the mouth (in fact in the postmortem report it is mentioned that the tongue was inside) and thereby submitted that it appears to be false that Pooja's death was a suicide and the mentioning of tongue was inside, in the post mortem report and other circumstantial evidence appear to be false, it is further submitted that the inference/opinion that the deceased might not have committed suicide merely on the fact that her tongue was out (of the mouth) cannot basically lead to an only definite conclusion that it was not a suicide but might be a murder**. It is mentioned in the Panchnama that the deceased Pooja was found dead in the kitchen-room and the stove without lid, match box around her and kerosene spilled all over on the flooring. If the fire incident had occurred in actuality then soot (smoke stains) should have been found on the wall; but in fact there is no mentioning in the scene of incident panchnama about causing soot (smoke stains) at the said place, in this regard on

behalf of the prosecution it has been submitted that Pooja might have been killed and might have been made unconscious (?) elsewhere and her dead body might have been brought and placed in the kitchen-room and false evidence, showing that she got burnt might have created. **Even this submission cannot strike out the earlier conclusion drawn about the death of Pooja that she might have committed suicide nor does it show (indicate) conclusively that only the murder of Pooja was caused**. The facts which have been mentioned in the scene of incident panchnama, in the inquest panchnama of the deceased Pooja and in the post mortem report of her dead body, are intact, no change seems possible therein. If the same inference drawn by construing these facts from different angle then, the earlier inference could have been struck out undisputedly and it should have been seen that those inference were not based on the facts. **It would be courageous to state here that in the criminal justice, if a particular fact could be stated in two (either) ways then the observation, which is in favour of the accused, is required to be accepted.**

5. It is unfortunate that death of the deceased Pooja, before her death she was grappled with mental illness and she was under treatment. Her letters have been produced alongwith the documents produced today. From which also, it does not find that there was any dispute between husband and wife.

6 Therefore while considering the anticipatory bail application, different particulars (facts/aspects) are required to be considered, wherein on the one hand motive of the murder, evidence gathered against the accused and on the basis of which the prima facie offence and its nature found against him and as well as if the anticipatory bail is granted then whether the same would cause any obstruction in the investigation of crime etc. on the other hand whether the personal liberty of the accused as an individual would endanger (infringe) by denying the bail, both these aspects are required to be considered subjectively. In this regard, it is observed in the case viz. State of Maharashtra Vs. Kacharu Singh Santram Rajput (1994) Cr.C.504). Moreover, it is also observed in Nancy Jamshed

Adjania and Others Vs. State of Maharashtra (1993) Cri.L.J.35(5) as to what Law Commission has stated about the purpose of anticipatory bail. On this day, in support of this application, the applicants relied on the decision of M.P.Lohiya and Others Vs. West Bengal State and Others (2005) AIR SCW 7(7). In this decision it is especially (mainly) dealth with as to how the documentary evidence is gathered from the relatives of the parental family. Wherein documentary evidence in support of their respective say had been fathered by both the parties accordingly. However, in the present matter, it is done from Pooja's parental family only, their anxiety, worry is certainly understandable but from the view point of justice these sentiments have to be kept slightly aside".

7. On behalf of the applicant this court, attention is drawn also to the High Court casewise Shantaram Baburao More 2002 ALL MR (Cri.) 1286. Wherein it has been ruled that **if there is a construction between the eyewitness account and medical expert's opinion then the eye witness account (evidence) is held valid (upheld). Even in this matter it has been put forth that only on the opinion expressed by the above referred medical college, Superintendent, new direction (angle) had received to the investigation of crime, even such expression of opinion is merely a kind of expressing the different opinion by Medical Experts only on the basis of circumstantial evidence**, but the facts ad circumstances are intact, but, only different meeting has been drawn from such facts. The inferences which were drawn from such facts. The inferences which were drawn earlier, at the end of the investigation, such inference are prime facie No.1 found to be failed in any manner whatsoever, on account of this new inferences drawn by the medical experts. Considering all these grounds there is no reason to deny anticipatory bail to accused no.1".

(emphasis supplied)

22. From bare perusal of the order, it is clear that the learned Judge has written the order of

anticipatory bail, as if he was writing the judgment of acquittal after evidence. The question of benefit to be given to the accused if the two views are possible, as observed earlier, does not arise at this stage and that could be considered only during trial when the entire evidence is before the Court. He has committed gross error of law in relying upon the aforesaid principles at the stage of investigation and while considering the application for anticipatory bail.

23. The learned Sessions Judge ought not to have substituted his opinion in respect of protruding of tongue out when the positive opinions of the experts were on record including of the Doctors of the Department of Forensic Medicine, Grant Medical College, stating that "protrusion of tongue out does not indicate suicidal nature of burn injuries". The courts are expected to consider the material before it very carefully and not in a casual manner taking one or two stray circumstances to hold that the circumstances do not indicate the complicity of the accused beyond reasonable doubt at the stage of investigation. In my opinion, in the present case, the accused had not made out any compelling circumstances for granting him anticipatory bail who was charged of the offence of murder of his wife. The

findings recorded by the learned Judge, in my opinion, were recorded without considering the material on record in proper prespective. He has exercised the discretion erroneously on irrelevant considerations and, therefore, is perverse and deserves to be set aside.

24. Mr.Chitnis, learned senior counsel placed reliance upon several judgments. He also took me through passages from some of the judgments and I found that in most of the judgments the Supreme Court has laid down the principles to be applied and borne in mind while dealing with the application for cancellation of bail. It is true that normally very cogent and overwhelming grounds or circumstances are required to cancel the bail already granted. However, while granting anticipatory bail if the learned Sessions Judge exercises judicial discretion either erroneously or on any irrelevant considerations and if the order is found to be perverse, the principles laid down in the judgments relied upon by the accused would not come in the way for setting aside the order granting anticipatory bail. And in that case the considerations such as whether the accused misconducted himself after grant of bail ? whether he endeavoured to tamper with the evidence ? whether he attempted to commit similar offence ? whether he

co-operated with the investigation ? whether he made himself available for interrogation ? or he is likely to abscond, render inconsequential. In the present case, I have already observed that the order granting anticipatory bail is perverse and based on irrelevant consideration and in view thereof, in my opinion, the judgments relied upon by Mr.Chitnis are of no avail to the accused.

25. In this case the prayer for setting aside the order of anticipatory bail and/or cancellation of anticipatory bail will have to be viewed from another angle also. It is now well settled that in the case of a defective investigation the Court has to be circumspect in evaluating the evidence and it would not be right in acquitting the accused persons solely on account of the defect; to do so would tentamount to playing into the hands of the investigating officer if the investigation is designedly defective. This is settled by the Supreme Court in **Karnel Singh Vs. State of M.P.** (supra). The contaminated conduct of the investigating officer should not stand in the way of further investigation; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. The primacy will have to be given to such designed or negligent investigation, to the omission or lapses by

perfunctory investigation or omissions, otherwise the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice. Therefore, when investigation is found to be designedly defective and if it is noticed by the Court either in the course of trial or investigation, the Court cannot turn its blind eye towards it. The Courts, in such cases, should pass appropriate direction/order including further investigation and for that purpose, if necessary, can proceed to cancel the bail or pre-arrest bail. Because the accused, in such cases, need not do anything to provide ground/s for cancellation of bail since the investigating agency does everything to save the accused. These observations are not general in character and may not be treated as aspersions on the police machinery at large. However, there are always exceptions to the rule and I wish to examine the present case from that angle to find out whether the investigation in the present case is such which falls in that category.

26. It is true that the investigating agency, in the present case, slept over the matter for quite sometime. But that by itself would not preclude the succeeding investigating agency from carrying out

further investigation and to apply for cancellation of bail. Looking to the overall facts and circumstances of the case and the documents referred to above, I am of the opinion that something more had happened, within the four walls where the dead body was found in burned condition. The investigating agency has made no efforts to investigate the offence in that direction. The accused, who was in the company of the deceased last, might know about the same. The investigation officer will not be able to take the case to its logical conclusion unless and until he is given free hand to carry out further investigation.

27. The alleged incident occurred sometime between 8.00 a.m. and 12.15 p.m. on 14.6.2000. The accused immediately reported the occurrence to the police and within an hours his statement was recorded and it was registered as accidental death report bearing No.17/2000. In that statement he gave timing of the alleged occurrence between 8.00 am and 12.15 pm. The A.D. report was registered at 13.15 pm. In the statement he had mentioned the reason why she committed suicide and expressed that there was nothing to suspect about her death and that he had no complaint. It appears from the record that till 10.00 am the deceased was alive. The accused had a telephonic talk with deceased - Pooja around that

time. After lodging the report at 1.15 pm, it reveals, the accused informed the complainant and other family members the incident at about 2.00 pm.

. The complainant and the other family member reached Khopoli on the very same day in the evening. The FIR was recorded in the intervening night between 16.6.2000 and 17.6.2000 and the crime was registered around 5.05 am on 17.6.2000 under section 498-A and 306 IPC. The accused obtained anticipatory bail on 29.6.2000. The explanation as to why the steps to arrest accused were not taken between 17.6.2000 and 29.6.2000 is not forthcoming.

28. The police completed the investigation and sought "A" summary and it was granted by the learned Magistrate on 21.2.2001. No notice was issued to the complainant before the order granting "A" summary by the Magistrate was passed though such notice was necessary in law. It appears from the record that between 17.6.2000 and 21.2.2001 the complainant had quite few occasions to visit Khopoli and to meet the investigation officer to enquire about the progress made by them in investigation and every time he was told that it was in progress. The complainant also had an occasion to obtain a copy of FIR and other documents during this time and on the basis thereof he

had addressed a detail letter dated 29.12.2000 bringing to the notice of the concerned police authorities the various circumstances creating doubt and requesting them to register the offence under section 302 read with 109, 115, 120-B and 201 IPC. The reminder was also sent on 15.1.2001.

. On 28.1.2001, the investigation officer by their letter informed the complainant that there was no strong and reliable evidence against the accused. The complainant had immediately rushed to Khopoli to enquire about the said letter and on 6.2.2001 he sent another letter to the Superintendent of police, Alibag, Dist. Raigad and Inspector of Khopoli police station requesting him to appoint some high ranking responsible officer to carry out further investigation. A reference to the letter dated 29.12.2000 was also made in the said letter dated 6.2.2001.

29. The complainant in view of the order dated 21.2.2001 passed by the learned Magistrate granting "A" summary filed criminal writ petition No.971 of 2001 for setting aside the said order and for seeking re-investigation in C.R.No.57/2000. This Court vide its letter dated 1.8.2001 quashed and set aside the order passed by the Magistrate and remanded the matter

with directions to hear the complainant and decide "A" summary report filed by the police afresh. The learned Magistrate after remand vide his order dated 6.10.2001 rejected "A" summary report and directed further investigation.

. After re-investigation as per the order dated 6.10.2001 passed by the learned Magistrate once again on 2.4.2002 the investigating officer filed "A" summary before the learned Magistrate. The moment complainant came to know about it he once again approached this Court in Criminal Writ Petition No.456 of 2002 seeking re-investigation of the crime in C.R.No.57/2000. This Court vide order dated 3rd May, 2002 disposed of the writ petition and while so doing made the following observations:

> . "There is a medical report of the expert Phatnani and the learned APP was asked to seek comments of Dr.Parmar on the said report. Dr.Parmar has admitted that there is some omission on their part in noting certain aspects while performing the post-mortem considering this aspect and the allegations alleged and the fact that once in the past "A" Summary was rejected by the Magistrate, we direct that the further investigation be done by the State, C.I.D. The Additional Director General of Police is directed to assign the said matter to the State CID. State CID to register appropriate offence whatever is disclosed in the investigation. Investigation should be completed as far as possible within six months from today".

30. It is true, as submitted by Mr.Chitnis,

learned senior counsel that it was incumbent upon the investigating agency to complete the investigation within the time stipulated in the above order and since it could not be, they ought to have approached this Court explaining the difficulties why they could not complete the investigation and sought further time to complete investigation. Mr.Chitnis submitted that now it is not open after three years to seek further time and custody of the accused for interrogation without disclosing the reasons as to why they could not complete the investigation within the time stipulated by the aforesaid order. He then submitted that the aforesaid order of this Court was flouted by the investigation officer. He further submitted that proviso to section 167 of the Code is akin to the order dated 3.5.2002 and therefore the observations in **Hitendra Thakur** (supra) and **P.V.Pavithan** (supra) clearly stand attracted. In my opinion, these judgments of the Supreme Court, in view of peculiar facts of this case, are of no avail to the accused and are not at all attracted. However, Mr.Chitnis, was justified in contending that the investigation ought to have been completed long back and if at all the investigating agency wanted custody of the accused they should have approached the Court seeking such prayer at the very inception. As a matter of fact the grievance made by Mr.Chitnis, supports the allegation

made by the petitioners that the investigation was either negligent or designedly defective.

31. In the present case, it may be noticed that the complainant did not keep a single stone unturned for moving the investigating agency from time to time. It appears that he made several trips to Khopoli and made representations to the concerned authorities and filed writ petitions from time to time. Despite that all, no remarkable progress was made by the investigating agency. From the conduct of the investigating agency, there is a scope to hold that investigation was designedly defective. Their lapses and omissions cannot be overlooked, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. There was no reason why they were moving at the snail’s pace.

32. Mr.Patil, learned counsel for the complainant, submitted that though not fully, to some extent the accused was also responsible for this delay. During the period between 1st June 2002 and 23rd May, 2006 the petitioner at intervals went out of India on eight occasions and all those visits were after the order of this court dated 3rd May, 2002. The investigating agency did not take objection for his seven visits to Kenya till 25th September, 2005. It appears that

thereafter his passport was seized in pursuance of the impugned order dated 13.12.2005.

33. It may be noticed, at this stage, that while granting anticipatory bail to the accused vide order dated 29.6.2000 the conditions were imposed by the Court that he shall not leave Khopoli without permission of the Court and that he shall report to the Khopoli police station daily between 6.30 to 8.30 pm until filing of the chargesheet. Admittedly, neither did he report to the police station as per directions of the Court nor did he observe the condition not to leave Khopoli without permission of the Court. Mr.Chitnis, endeavoured to justify the lapse on the part of the accused contending that since he was not arrested by the police after the order dated 29.6.2000, there was no question of the reporting to the police station. He further submitted that even the police did not call him for interrogation at all. Therefore, according to Mr.Chitnis, the accused cannot be said to have committed any breach of the order dated 29.6.2000. The submission of Mr.Chitnis, that he did not leave Khopoli for a period of four years after the order dated 29.6.2000 does not appear to be correct because on his own showing he went to Kenya on 1st June, 2002 then on 2nd November, 2003 and on 27th January, 2004.

This all clearly show that after grant of anticipatory bail the accused violated the conditions imposed by the court. The investigating agency did not even find it necessary to call him for interrogation after his release on bail vide order dated 29.6.2000. The questions, Why the police did not even bother to find out whether he was available in Khopoli ? why he was not attending the police station as per the order dated 29.6.2000 ? Why did they not move the Court for cancellation of bail ?, remained unanswered. This conduct creates serious doubt about their role.

. It also reveals from the statement of the wife of the complainant - Pratibha, recorded in 2004, that immediately after the occurrence when they had reached Khopoli, she had noticed blackening of other room and that was shown to several neighbours. The investigating agency was also informed about it. However, they have no answer as to why her statement was not recorded immediately after registration of the offence on 17.6.2000. They even did not bother to draw panchnama of the entire flat which was necessary in the facts and circumstances of this case. Even the conduct of the Doctor, who admitted his lapses while conducting the post mortem, creates serious doubt about his intention and motives.

34. It appears that during 3.5.2002 and 12.8.2005 the statements of several witnesses were recorded and even the opinions of medicolegal experts were sought and in pursuance thereof the charge was altered under section 302 IPC on 12th August, 2005. It is from that stage the investigating agency seem to have taken the things seriously since they had collected sufficient material to prima facie establish that it was an offence under section 302 and not under section 306.

35. A bare look at the sequence of the events, as aforestated, one would find that the conduct of investigating officer right from the inception was tainted or contaminated. Twice the complainant had to approach this court for either getting the order granting "A" summary set aside or seeking directions for further investigation when the second "A" summary report was filed before the Magistrate, and on both these occasions the Division Bench of this Court prima facie found substance in the contentions of the complainant. This Court had not only set aside the order granting "A" summary, but looking to the overall facts and circumstances of the case had to pass order transferring the investigation from Khopoli police station to C.I.D., which, in my opinion, tantamounts to express no confidence in the local police station. It is very pertinent to note that the C.I.D., after

further investigation, may be at belated stage, approached the Court seeking permission to alter the charge and they were allowed to register the crime under section 302 IPC. Thus, it is clear that had the investigating agency taken prompt action/steps, immediately after the occurrence, probably, that would have changed the complete complexion of the matter.

36. I am satisfied that this is a fit case where the order of the trial Court deserves to be quashed and set aside. In the result, the rule is made absolute in following terms:

(a) The order dated 13.12.2005, granting anticipatory bail to the accused under section 438 of the Code, is quashed and set aside and as a consequence thereof the anticipatory bail stands cancelled.

(b) Criminal application no.882 of 2006, insofar as respondent nos.2 and 3 are concerned, stands dismissed as not pressed.

(c) Liberty to the accused to apply for bail only on expiry of one month after his surrender.

(d) The accused is directed to surrender on or before 15.9.2006 and it is made clear that no extension to surrender shall be granted on any ground whatsoever.

(D.B.BHOSALE,J.)